IN THE MATTER OF THE ONTARIO *LABOUR RELATIONS ACT, 1995*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

COLD SPRINGS FARM LTD.
- the Employer

-and-

CANADIAN NATIONAL FEDERATION OF INDEPENDENT UNIONS
- the Union

AND IN THE MATTER of a termination grievance of Richard Bull

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Frank A. Angeletti	- Counsel
Elaine Thompkins	- Vice-President, Human Resources
Pat Powers	- Manager, Labour Relations

On behalf of the Union:

Boris Bohuslawsky	- Legal Representative
Moe Wayner	- Union President
Ann Waller	- Business Representative
Trudy Gee	- Steward
Richard Bull	- Grievor
Martin Brown	- Grievor

Hearing held June 13, 2002 in Ingersoll, Ontario.

AWARD

I. INTRODUCTION

Three grievances involving two grievors were referred to arbitration. This award deals only with the Employer's preliminary objection in the termination grievance of Richard Bull. The parties disagreed as to whether the Union's conduct conveyed acceptance of the Employer's offer of settlement.

II. THE EVIDENCE

Three grievances were referred for arbitration under the expedited arbitration provisions of the *Labour Relations Act, 1995*. All three grievances involved alcohol related infractions. The Employer asserted that Mr. Bull's termination grievance had been settled by the parties and thus was not arbitrable.

January 14, 2002, Cold Springs Farm, the Employer, suspended Richard Bull for five days. In February the Employer terminated Mr. Bull's employment. In February the Employer also suspended Martin Brown for five days.

Although grievance discussions are normally privileged, in this case it is necessary to consider those talks as it is those discussions which are in dispute. The parties discussed all three grievances at a Step 3 grievance meeting February 11, 2002, and a major topic was the Employer's Alcohol and Drug Policy dated January 24, 2002. One of the Union's concerns was that Mr. Bull's initial five day suspension occurred before that Policy was announced.

Pat Powers, the Employer's Manager of Labour Relations and the spokesperson for the Employer throughout the grievance discussions, had been instructed to attempt to settle the grievances although he made no offer during the February 11 meeting. The following day

Mr. Powers spoke to Moe Wayner, the President of the Union, in passing and informed Mr. Wayner that the Employer would bring Mr. Bull back to work and would make an offer of settlement of Mr. Bull's grievance. Mr. Wayner made no reply.

February 14 Mr. Powers telephoned Mr. Bull and informed him that he could come back to work. Mr. Powers suggested a February 19 return but Mr. Bull had a commitment that day and they agreed upon February 20. Mr. Bull returned to work February 20.

February 21 Mr. Powers met with Mr. Wayner and other Union officials and made an offer to settle the termination grievance. The proposal was contained in a memo headed "Third Step Answer". The text was as follows:

> The Company will change Mr. Bull's termination to a suspension without pay, time served from February 4th to February 13th, 2002. Mr. Bull was asked to return to work on February 12, 2002, but was unable to because of a commitment that he had. This offer is for full and final settlement of this grievance.

(I note that the evidence at the hearing indicated the grievor was asked to return February 19, not February 12.)

The Employer alleged the grievance was settled on the terms contained in that proposal. Mr. Powers testified that while the Union objected to Mr. Bull's original five day suspension, no one for the Union had indicated that the settlement proposal was unacceptable either orally or in writing. Mr. Powers further testified that he believed the termination grievance had been settled and said that, had the matter not been settled, Mr. Bull would have had to leave work.

Mr. Wayner, to whom the offer was given, testified that he had thanked the Employer "for bringing Richard [Bull] back" but he recalled saying "at no point do I accept that as a settlement of these grievances" and by grievances he meant Mr. Bull's two grievances. Mr. Wayner testified that nothing further was said and the meeting ended and the participants

dispersed. He agreed that he made no written response to the proposal.

III. COLLECTIVE AGREEMENT PROVISIONS

The following is the relevant provision of the parties' 2001-2003 collective agreement.

ARTICLE SEVEN - GRIEVANCE PROCEDURE

. . .
7.05 Settlement in any step of the grievance procedure shall be final and binding upon both parties to the Agreement and upon any employee affected by it. . . .

IV. EMPLOYER POSITION

It was the Employer's position that considering the evidence of Mr. Powers, the evidence from Mr. Wayner of the Union and the performance of the settlement by the Employer, the only reasonable conclusion was that the conduct of the Union indicated the offer was accepted as a full and final settlement. The Employer asked me to conclude that the termination grievance was not arbitrable.

February 21 the Employer gave the settlement offer to the Union. The language was clear - "will change" the termination to a suspension and the "offer" was for "full and final settlement". That offer was not rejected at the meeting. There was no oral or written response. Mr. Powers believed the matter was settled and he testified that if it had not been settled the grievor (Mr. Bull) would have had to leave work. The grievor continued to work. The facts pointed to a settlement.

In response to Mr. Wayner's testimony that he had thanked the Employer for bringing Mr. Bull back to work but that at no time did Mr. Wayner accept the offer as a settlement of the

grievances, the Employer submitted that Mr. Wayner was actually referring to the two suspension grievances (Bull and Brown), not to Mr. Bull's termination grievance.

The Employer referred to the following: *Re W. Ralston (Canada) Inc. and Communications, Energy and Paperworkers Union of Canada, Local 819 (Berry Grievance)* (2000), 90 L.A.C. (4th) 47 (Shime); *W. Ralston (Canada) Inc. v. Communications, Energy and Paperworkers Union of Canada,* [2001] O.J. No. 2195 (Ont. Div. Ct.); and *Re Network North and Ontario Public Service Employees Union, Local 666* (1996), 53 L.A.C. (4th) 102 (Thorne).

V. UNION POSITION

The Union said the onus was on the Employer to establish its objection. A settlement required agreement between the parties and it was incumbent upon the Employer to lead evidence that demonstrated agreement. It had not done so.

While there was an indication February 12 that a settlement offer would be made, no offer was made then. It was clear that there was no settlement at that time.

Soon thereafter the Employer, through Mr. Powers, contacted the grievor (Mr. Bull) and told him the Employer was bringing him back to work. The Union said this indicated the Employer had unilaterally decided to reduce the termination to a suspension. The grievor returned to work February 20 with a suspension.

February 21 the Employer presented an offer and Mr. Wayner replied that the Union did not accept it as a settlement of "the grievances". In that context the statement was not a reference to the two suspension grievances but rather to Mr. Bull's two grievances, including the termination grievance. There was no settlement. The offer followed the return to work, was written in the future tense, and was never accepted. Neither the conduct of the Union nor of

the grievor indicated acceptance of the Employer's offer.

The Union asked me to dismiss the Employer's objection.

VI. CONCLUSIONS

In general terms, the grievance procedures common in collective agreements are intended to promote the speedy and amicable resolution of differences between the parties. If the parties agree upon the resolution of a grievance, the expectation is that each will abide by that resolution.

This collective agreement makes it clear that a settlement of a grievance is binding upon these parties (see Article 7.05, above).

The idea of a grievance settlement is easily understood. It is based on contract law principles. At its basic level, a settlement occurs when one side makes an offer which the other side accepts as resolving the grievance. Both the offer and the acceptance can be in writing but, as with many other agreements, need not be in writing. Both the offer and the acceptance may be oral. In addition, either the offer, or more commonly the acceptance, may be evidenced by conduct. Conduct is simply what a party does, as distinct from what a party writes or says, and on occasion a party's behaviour or actions may indicate that agreement has been reached. The necessary elements are that the parties reach agreement, that they have a meeting of the minds as to the terms of their settlement, and that they communicate this to each other.

Was this termination grievance settled by the parties?

In this case, did the parties have a meeting of the minds as to the terms which would be

satisfactory for resolving their difference regarding the grievor's termination?

The terms of a possible settlement were put in writing in Mr. Power's February 21 memo. If the Union accepted that proposal - whether in writing, orally or by conduct - then the Union and the Employer, as well as the grievor, would be bound by it.

The Union did not accept the proposal in writing. The parties disagreed on whether the Union rejected the offer orally. The Employer said the acceptance was communicated by the Union's conduct.

Was the offer rejected orally?

Mr. Wayner said he advised Mr. Powers at the February 21 meeting that the Union was not accepting the Employer's offer as a settlement of the grievances. On the other hand, Mr. Powers testified that no one for the Union rejected the offer. I accept that each has a different recollection of what was said. I believe each testified honestly as to his memory of that meeting.

In order to reject an offer, the message of rejection must be conveyed to the other side. For whatever reason, and despite his intention, I conclude Mr. Wayner did not convey a message of rejection to Mr. Powers. It follows that the Union did not reject the Employer's offer.

But it is not the case that an offer is accepted unless it has been rejected; a failure to reject does not equal acceptance. The mere passage of time does not amount to acceptance. Acceptance requires a positive act. In order to have a settlement, the party to whom the offer was made must say or do something which indicates its acceptance of that offer.

Was the offer accepted by conduct?

I am unable to conclude from the Union's conduct in this case that the Union agreed with the Employer on the terms of a settlement. The conduct of the Union simply does not convey its acceptance of the offer of settlement. The conduct is equivocal in nature; it is consistent with acceptance, and with rejection, and with the Union simply delaying a decision.

The grievor had returned to work when the Employer made its offer on the following day. The mere fact that the Employer made a settlement offer cannot retroactively convert the grievor's return to work, which occurred before that offer was made, into the communication of acceptance of the offer.

Nor can I see the continuation of the grievor's employment after the offer was made as the communication of agreement with the settlement proposal. The grievor's continuing to work might have been the communication of acceptance of the settlement offer if, for example, the Employer had indicated in the offer that "if this offer is acceptable, all that Mr. Bull need do is continue to work. If it is unacceptable, all that Mr. Bull need do is to cease coming to work", or other words to that effect. But the offer makes no such statement and I cannot find that the grievor's continued work communicated acceptance of the terms of the offer. His continued working is what one would expect when a Union and a grievor believed the termination was excessive and believed the Employer had agreed with that view by bringing the grievor back to work.

Mr. Powers testified that if the settlement had not been accepted the grievor would have had to leave work. However Mr. Powers did not communicate that view to either the grievor or to the Union. In the absence of any communication of that view, I find the parties' conduct did not signify agreement on the part of the Union to that offer.

I conclude from the conduct of the parties in this instance that there was no meeting of the minds as to a settlement and thus this grievance was not resolved. I reject the Employer's

preliminary objection that Mr. Bull's termination grievance had been settled. That grievance may be heard on its merits.

I remain seised to deal with all three grievances.

Dated in London, Ontario this 9th day of July, 2002.

Howard Snow, Arbitrator